Supreme Court, U.S.
FILED

97 1074 DEC 29 1997

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No.

In the

Supreme Court of the United States

October Term, 1997

PETER VERNIERO, Attorney General of New Jersey, *et al.*,

Cross-Petitioner,

v.

W.P., *et al.*, Individually and as Representatives of a Class Pursuant to Fed.R.Civ.P. 23(a) and 23 (b)(2),

Cross-Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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26 pp

QUESTIONS PRESENTED

I. Whether the Third Circuit erred in holding that the federal Due Process Clause requires New Jersey to provide sex offenders registered under Megan's Law with a hearing at which the State bears the burden of proof and must establish the relative degree of risk of reoffense by clear and convincing evidence, which conflicts with the procedures established by the Supreme Court of New Jersey based upon that court's due process analysis.

II. Does the recognition by the Supreme Court of New Jersey of a liberty interest in privacy and reputation under New Jersey's Constitution represent a state-created liberty interest that may not be deprived without compliance with federal due process principles, thereby allowing a federal court to second-guess and supplant procedural protections established by New Jersey to further its State constitutional doctrine of fundamental fairness?

PARTIES TO THE PROCEEDING

In addition to those listed in the caption to the case, which appears on the cover of this cross-petition, the parties to the proceeding also consist of the following, all of whom were also defendants-appellees below and are respondents before this Court:

Jeffrey S. Blitz, Atlantic County Prosecutor;
Charles R. Buckley, Acting Bergen County Prosecutor;
Stephen G. Raymond, Burlington County Prosecutor; Joseph F. Audino, Acting Camden County Prosecutor;
Stephen D. Moore, Cape May County Prosecutor;
Neil S. Cooper, Acting Cumberland County Prosecutor;
Clifford J. Minor, Essex County Prosecutor;
Harris Y. Cotton, Gloucester County Prosecutor;
Carmen Messano, Hudson County Prosecutor;
Sharon B. Ransavage, Hunterdon County Prosecutor;
Maryann K. Bielamowicz, Mercer County Prosecutor;
Robert W. Gluck, Middlesex County Prosecutor;
John Kaye, Monmouth County Prosecutor;
W. Michael Murphy, Jr., Morris County Prosecutor;
Daniel J. Carluccio, Ocean County Prosecutor;
Ronald S. Fava, Passaic County Prosecutor;
Ronald a Epstein, Salem County Prosecutor;
Melaine B. Campbell, Acting Somerset County Prosecutor;
Dennis O'Leary, Sussex County Prosecutor;
Edward Neafsey, Acting Union County Prosecutor;
John J. O'Reilly, Warren County Prosecutor.

By virtue of consolidation of two separate cases by the court of appeals, an individual designated "E.B." (a fictitious name) was also a party to the proceedings below as plaintiff-appellant. "E.B." did not petition for a writ of *certiorari*.

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OPINIONS BELOW

The March 15, 1996 opinion and order of the United States District Court for the District of New Jersey, which certified a plaintiff class and entered a preliminary injunction staying community notification under Megan's Law as to the class members, is reported as *W.P. v. Poritz*, 931 F. Supp. 1187 (D.N.J. 1996), and is reprinted in petitioners' Appendix I [187a-208a]. The July 1, 1996 opinion and order of the United States District Court for the District of New Jersey, which granted summary judgment in favor of defendants (including cross-petitioner) and lifted the injunction, is reported as *W.P. v. Poritz*, 931 F. Supp. 1199 (D.N.J. 1996) and is reprinted in petitioners' Appendix H [133a-186a].

The July 9, 1996 order of the United States Court of Appeals for the Third Circuit, which stayed the order of the district court and continued the injunction during the pendency of the appeal, was not published and is reprinted in petitioners' Appendix G [131a-132a]. The August 20, 1997 opinion of the court of appeals, which affirmed in part and reversed in part, is reported as *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997), and is reprinted in petitioners' Appendix B [4a-120a]. The September 17, 1997 order of the court of appeals, which denied the petition for rehearing and rehearing *in banc*, is reported as *W.P. v. Verniero*, 127 F.3d 298 (3d Cir. 1997), and is reprinted in petitioners' Appendix C [121a-123a]. The October 3, 1997 amended judgment of the court of appeals, which corrected a clerical error, is not published and is reprinted in petitioners' Appendix A [1a-3a].

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit rendered its decision on August 20, 1997. The court of appeals denied petitioners' timely motion for rehearing on

September 17, 1997. On November 28, 1997, petitioners filed a petition for a writ of *certiorari*, Docket No. 97-887. This conditional cross-petition is timely filed pursuant to Rule 12.5. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1.

Article I, ¶ 1 of the New Jersey Constitution provides: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. Const. (1947), Art. I, ¶ 1.

STATUTORY PROVISIONS INVOLVED

New Jersey's Registration and Community Notification Laws, Pub. L. 1994, Chs. 128, 133 (codified at N.J. Stat. Ann. §§ 2C:7-1 to 7-11), popularly known as "Megan's Law," are reprinted in petitioners' Appendix J.

STATEMENT OF THE CASE

In the event the Court grants the petition for a writ of *certiorari* filed by petitioners (plaintiff-appellants below), Peter Verniero, the Attorney General of New Jersey, requests review of the portion of the court of appeals' decision which held that the Due Process Clause of the Fourteenth Amendment requires a different burden of persuasion and higher standard of proof in Megan's Law

hearings than was required under the procedures established in accordance with the decision of the Supreme Court of New Jersey. The court of appeals issued its decision in the context of a challenge to the constitutionality of the sex offender community notification requirements of New Jersey's Megan's Law, brought by a class of convicted sex offenders required to register under Megan's Law who committed predicate sex offenses before the October 31, 1994 effective date of the law and who have been or will be classified as a Tier 2 (moderate-risk of reoffense) or Tier 3 (high-risk) offender. *E.B. v. Verniero*, 119 F.3d 1077, 1087 (3d Cir. 1997), Appendix ("App.") B at 22a.[1]

The New Jersey Legislature enacted Megan's Law on October 31, 1994, to address the "danger of recidivism posed by sex offenders and others who have committed predatory acts against children, and the dangers posed by persons who prey on others as a result of mental illness." N.J. Stat. Ann. § 2C:7-1(a). Megan's Law established a system of registration of sex offenders and offenders who commit other predatory acts against children, N.J. Stat. Ann. § 2C:7-1(b), and a notification program in which the scope of notice is calibrated to the comparative risk of reoffense posed by the individual registered offender. *E.B.*, 119 F.3d at 1082-83, App. B at 10a. Under the three-tiered notification program, where the risk of reoffense is comparatively low (Tier 1 notification), dissemination of notice is limited to law enforcement authorities; where the risk is moderate (Tier 2 notification), institutions and organizations having the responsibility to care for and supervise children and women and which are likely to encounter the offender also receive notice; and where the risk is high (Tier 3 notification), those members of the

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[1] All subsequent citations to the decisions of the court of appeals and the district court in this case will be to the published decisions and to the page numbers of petitioners' appendix to their petition.

public likely to encounter the offender are also notified. *E.B.*, 119 F.3d at 1083, App. B at 10a.

In *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995), the Supreme Court of New Jersey held that due process requires "judicial review of the Tier classification and the manner of notification prior to actual notification." *Id.* at 382. The court premised this conclusion upon a finding that community notification under Megan's Law implicates protectible liberty and privacy interests under the Due Process Clauses of the state and federal Constitutions, as well as in consideration of New Jersey's fundamental fairness doctrine. *Id.* at 417-20. Accordingly, the court established a comprehensive scheme for judicial review, with the following features:

> (1) except in exigent circumstances, offenders subject to notification receive written notice at least two weeks in advance, detailing the proposed Tier level and the specific manner proposed for notification;
>
> (2) the offender has the right to object to notification by filing a simple application with the court in his own county;
>
> (3) the offender is entitled to an automatic stay of notification if he files a timely objection;
>
> (4) the offender has the right to be represented by retained counsel, or, if he cannot afford it, to have free counsel appointed by the court;
>
> (5) the court is required to immediately set a date for a pre-notification court hearing;

(6) the offender is provided with extensive pre-hearing discovery of "all papers, documents, and other materials, including the prosecutor's findings and statement of reasons for the level and manner of the proposed notification;"

(7) the offender receives a hearing before a neutral fact-finder, a state trial court judge;

(8) the offender's privacy is protected because the hearing is held *in camera*;

(9) at the hearing, the State bears the initial burden of establishing a *prima facie* case justifying the proposed Tier level and manner of notification;

(10) if the prosecutor meets this burden, the offender then has the opportunity to rebut the State's *prima facie* case, by a preponderance of the evidence;

(11) the rules of evidence do not apply at the court hearing;

(12) notification cannot occur unless it is approved or meets the requirements set by the court; and

(13) if the court orders notification, the offender may seek to stay notification "to allow time for application to an appellate court."

Doe v. Poritz, *supra*, 662 A.2d at 382-85; *see also W.P. v. Poritz*, 931 F. Supp. at 1220, App. H, 176a-177a. The "*prima facie* case" must include a description of the class of

sex offenders required to register that constitute each tier level, including a description of each risk and some proof that the sex offender poses the risk of re-offense for that category (*i.e.*, substantially higher risk than those persons in the lower categories). *Doe v. Poritz*, *supra*, 662 A.2d at 384. The likelihood of reoffense is not the issue at these hearings, "but rather the relatively greater risk of reoffense compared either to the low-risk offender class or the moderate risk offender class." *Ibid.*

The Supreme Court of New Jersey further refined this procedure in *In re Registrant C.A.*, 679 A.2d 1153 (N.J. 1996), reiterating the basic tenets of the process to be afforded in state tier classification proceedings. In particular, the court reaffirmed that the appropriate hearing format is that utilized for probation violation hearings as set forth in *State v. Reyes*, 504 A.2d 43 (N.J. App. Div.), *certif. denied*, 511 A.2d 671 (N.J. 1986), where the State has the initial burden of presenting a *prima facie* case, which the challenger may rebut by a preponderance of the evidence. The court emphasized that only if the prosecutor satisfies his or her burden does the burden shift to a registrant challenging the proposed classification or notice. *C.A.*, *supra*, 679 A.2d at 1158.

On January 12, 1996, seven individuals previously convicted of sex offenses filed a complaint in the United States District Court for the District of New Jersey pursuant to 42 U.S.C. § 1983, alleging that the retroactive application of the community notification provisions of Megan's Law violates constitutional prohibitions against ex post facto laws and double jeopardy, and that the proceedings under Megan's Law violate the procedural due process protections of the Fourteenth Amendment. Subsequently, the district court certified a plaintiff class consisting of all sex offenders who committed predicate sex offenses before the October 31, 1994 effective date of Megan's Law who are or will be

subject to Tier 2 or Tier 3 notification. *W.P. v. Poritz*, 931 F. Supp. 1187 (D.N.J. 1996), App. I at 187a-208a.

The district court granted summary judgment in the State's favor, finding in pertinent part that the procedures established by the Supreme Court of New Jersey do not violate the Fourteenth Amendment's Due Process Clause. *W.P. v. Poritz*, 931 F. Supp. 1199 (D.N.J. 1996), App. H at 173a-186a.[2] The district court held the procedures to be within the "'flexible' boundaries of procedural due process recognized in *Mathews* [*v. Eldridge*, 424 U.S. 319 (1976),]" and found the evidentiary standard and placement of the burdens of proof as ordered by the state high court to be constitutionally sufficient. *W.P. v Poritz, supra*, 931 F.Supp. at 1222-23, App. H at 180a-184a.

Petitioners appealed from the district court's decision, and the court of appeals issued its decision on August 20, 1997. The court of appeals found that community notification under Megan's Law does not violate the Ex Post Facto or Double Jeopardy Clauses of the United States Constitution, but held that the procedures ordered by the Supreme Court of New Jersey for judicial review of tier classification and manner of notification are insufficient to protect petitioners' due process rights under the federal Constitution. Specifically, the court of appeals held that the Due Process Clause requires "a prior opportunity to challenge the registrant's [Tier 2 or Tier 3] classification and notification plan in a hearing at which the prosecutor has the

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[2] In challenges to the prospective application of Megan's Law, two other district court judges in the District of New Jersey have held that the procedures mandated by the Supreme Court of New Jersey meet federal due process standards. *Alan A. v. Verniero*, 970 F. Supp. 1153, 1179-87 (D.N.J. 1997), *vacated on jurisdictional grounds*, Docket No. 97-5410, unpublished opinion (3d Cir. Dec. 10, 1997); *Paul P. v. Verniero*, Civ. Action No. 97-2919(JEI), unpublished opinion, Tr. at 171-78 (D.N.J. June 26, 1997).

burden of persuasion and must prove her case by clear and convincing evidence." *E.B.*, 119 F.3d at 1111, App. B at 81a. Accordingly, the court of appeals reversed the judgment of the district court and remanded the matter with instructions to enter an injunction foreclosing notification in Tier 2 or Tier 3 cases without compliance with these requirements of procedural due process and to deny any further relief. *Ibid.*

In issuing such instructions, the court of appeals essentially compelled the State to comply with the *E.B.* holding, forcing the State to either modify its procedures or forego the implementation of a public safety measure designed to provide some measure of protection against recidivist acts by convicted sex offenders. On August 27, 1997, cross-petitioner applied to the Supreme Court of New Jersey for amendment to the Megan's Law judicial review procedures, to ensure that law enforcement officials are not barred by federal injunction from fully implementing the notification plans authorized by final orders issued in the state court proceedings. On September 10, 1997, the Supreme Court of New Jersey ordered that:

> the procedure applicable to tier classification and notification determinations under the Registration and Community Notification Laws (RCNL), *N.J.S.A.* 2C:7-1 to -11, is hereby amended to require that in any such tier classification and notification determination, the State has the burden of persuasion to establish the registrant's tier classification and notification by clear and convincing evidence[.]

Order, *In re Amendment to Procedure for Hearings on Objections to Megan's Law Tier 2 and Tier 3 Classification and Manner of Notification Determination*, (N.J. September 10, 1997). The Order also provides that all registrants

whose classification and notification determinations were made in accordance with the prior procedure will be afforded appropriate notice of "the opportunity to seek redetermination of their tier classification and notification determinations in accordance with the procedures as hereby modified to conform to the decision in *E.B. v. Verniero*[.]" *Ibid.* By order dated December 9, 1997, the Supreme Court of New Jersey adopted a revised Outline of Procedure in compliance with the court's previous order of September 10, 1997.

On November 28, 1997, the Clerk of the Supreme Court docketed petitioners' petition for a writ of *certiorari*, seeking review of the court of appeals' ruling denying petitioners' ex post facto and double jeopardy claims. Cross-petitioner is submitting a separate response in opposition to that petition. In the event this Court were to grant petitioners' requested review, it is respectfully requested that this Court also review the court of appeals' holding that, in state court hearings to review the tier classification and manner of notification determinations under Megan's Law, federal due process requires the prosecutor to bear the burden of persuasion by clear and convincing evidence.

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve the Conflict between the Court of Appeals and the Supreme Court of New Jersey regarding the Burden of Persuasion and Standard of Proof Required by Due Process in a Megan's Law Hearing.

Simply stated, there is a genuine and direct conflict between the decisions of the United States Court of Appeals for the Third Circuit and the Supreme Court of New Jersey concerning the question of the burden of persuasion and standard of proof required by the Due Process Clause of the federal Constitution in challenges to sex offender tier classification and manner of notification under Megan's Law. A disagreement between a federal court and a state's highest court on the same constitutional issue involving the same state law provides a sound basis for review by this Court. *See, e.g.*, *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974)(*certiorari* granted to resolve a conflict between the federal district court and the Arizona Supreme Court on whether a statute violated the Equal Protection Clause).

As applied to New Jersey's law, the *E.B.* decision results in an increased risk of error in the underestimation of an individual sex offender's relative risk of reoffense (and concomitant limitation of the scope of notification) due to application of the burden of persuasion and standard of proof mandated in accordance with the holding of the court of appeals than there is under the procedure ordered by the Supreme Court of New Jersey in *Doe v. Poritz*. This decisional conflict involves a divergence as to the relative magnitude of the State interest in providing community notification about moderate and high risk sex offenders versus the private interests of registrants in avoiding such notification. It also implicates considerations of comity with respect to the ability of a state court of last resort to establish judicial review procedures to protect liberty interests which

a federal court views solely as arising under the state Constitution. Accordingly, the due process issues raised in this case merit review by this Court.

Both the Supreme Court of New Jersey and the court of appeals analyzed the procedural due process issues by applying the factors identified in *Mathews v. Eldridge*, 424 U.S. 319 (1976). These factors include the importance of the private interest; the length or finality of the deprivation; the likelihood of government error; and the magnitude of the government interest involved. *Id.* at 334-35. The procedure established by the Supreme Court of New Jersey, in accordance with its holding on the requirements of due process, provided that:

> the State shall have the burden of going forward, that burden satisfied by the presentation of evidence that *prima facie* justifies the proposed level and manner of notification. Upon such proof, the offender shall have the burden of persuasion on both issues, the burden to remain with the offender.... [T]he court, assuming the State has satisfied its burden of going forward, shall affirm the prosecutor's determination unless it is persuaded by a preponderance of the evidence that it does not conform to the laws and [the Attorney General's] Guidelines. [*Doe*, *supra*, 662 A.2d. at 383.]

The shifting burden of persuasion established by the *Doe v. Poritz* decision reflects the state court's balancing of the registrants' reputational and privacy interests in the nondisclosure to the public of information provided under Megan's Law against the State's compelling interest in sharing accurate, largely public, record information that can protect communities (especially children) from a particularly devastating type of violent crime. The district court found

no fault with the procedural burden ordered by the state court: "the offender who initiates a proceeding before the Superior Court for review of his Tier classification is not unlike a plaintiff in a civil action, one who traditionally bears the burden of proof by a preponderance of the evidence." *W.P. v. Poritz*, *supra*, 931 F. Supp. at 1223, App. H at 183a. The district court also noted that, "under Megan's Law, the prosecutor must establish a *prima facie* case before the offender is required to go forward," observing that "this requirement placed upon the prosecutor affords to the offender a procedural benefit not enjoyed by a traditional civil plaintiff." *Ibid.*

The court of appeals disagreed, finding that the Due Process Clause "would be violated by any Tier 2 or Tier 3 notification that occurred without a prior opportunity to challenge the registrant's classification and notification plan in a hearing at which the prosecutor has the burden of persuasion and must prove her case by clear and convincing evidence." *E.B.*, *supra*, 119 F.3d at 1111, App. B at 81a. In reaching its contrary conclusion, the court of appeals noted that the risk of error in a Megan's Law hearing is "substantially greater than that in a typical civil damage suit" and held that this risk justifies the assignment of the burden of persuasion to the prosecutor. *Id.* at 1109, App. B. at 75a. However, just as the State has no interest in notifying the public about a registrant who has erroneously been identified as a moderate or high risk, it has a compelling interest in not erroneously identifying a registrant as a low risk and thereby withholding notification information from potential victims and relevant caregivers likely to encounter the registrant. The court of appeals regarded this risk differently than did the state court and district court, and reached a contrary conclusion.

The minimum standard of proof required by the Due Process Clause "reflects not only the weight of the private and public interests affected, but also a societal judgment

about how the risk of error should be distributed between the litigants." *Santosky v. Kramer*, 455 U.S. 745, 755 (1982). The state court found it appropriate for the registrant to share equally in the risk of error, having concluded that the privacy interests involved in notification are "diminished" because the information is mainly a matter of public record. *Doe*, *supra*, 662 A.2d at 411. The state court expressly held that the information is "not deserving of a particularly high degree of protection." *Ibid.* This led the court to adopt the preponderance of error standard, which allocates the risk of error equally among the litigants rather than having one litigant bear the brunt of the risk. *Santosky v. Kramer*, 455 U.S. at 755.

The court of appeals, although it deferred to the state court's finding of a protected interest in the *Doe* decision, nonetheless accorded to the interest a significantly greater weight than did the state court in *Doe*. In so doing, the court of appeals transformed those interests into a right different than that recognized by the state court. The court of appeals opined that "[a]n erroneous underestimation of an individual's dangerousness will not necessarily result in harm to protected groups" and contrasted that with the observation that "an overestimation of an individual's dangerousness will lead to immediate and irreparable harm to the offender: his conviction becomes public, he is officially recorded as being a danger to the community, and the veil of relative anonymity behind which he might have existed disappears." *E.B.*, *supra*, 119 F.3d at 1110, App. B. at 77a-79a. The court of appeals therefore issued its decision contrary to the state court's decision, determining "clear and convincing evidence" to be the appropriate standard of proof.

However, the "clear and convincing" standard is reserved for matters involving a significant infringement on constitutionally protected interests. *See Addington v. Texas*, 441 U.S. 418 (1979) (civil commitment); *Santosky*, *supra*, 455 U.S. 745 (termination of parental rights); *Hollis v.*

Smith, 571 F.2d 685 (2d Cir. 1978) (indeterminate sentencing); *Jenkins v. McKeithen*, 395 U.S. 411 (1969)(criminal investigations). The application of this standard to Megan's Law judicial review proceedings is inconsistent with the civil, remedial character of the law.

In light of the clear conflict between the decisions of these two courts on these significant procedural issues, it is respectfully requested that, should the Court grant *certiorari* to review petitioners' claims, it also consider the merits of these due process issues upon which the Supreme Court of New Jersey and the United States Court of Appeals for the Third Circuit disagree.

II. This Court should consider the important question of whether a liberty interest for which the Due Process Clause of the state Constitution requires procedural protection automatically triggers application of the procedural requirements of the Fourteenth Amendment.

In the course of its procedural due process analysis, the court of appeals observed, "the scope of the phrase 'liberty interest' as used in the context of the Due Process Clause has not been fully delineated." *E.B.*, *supra*, 119 F.3d at 1106 n.27; App. B at 67a. The accuracy of this proposition is embodied by the court's expansive construction of liberty interests under the Fourteenth Amendment to automatically include any liberty interest a state court recognizes as protected under the Due Process Clause of a state constitution. Under the reasoning applied in *E.B.*, all state-protected liberty interests would trigger the procedural protections of the Fourteenth Amendment, irrespective of whether the same interest is protected under the federal Constitution. This construction could render meaningless any lesser protections deemed to meet state constitutional requirements. This result is particularly inappropriate where the state court decision, which the federal court second-

guesses, provides the springboard to the federal court's due process analysis.

In *Doe v. Poritz*, the Supreme Court of New Jersey found that the disclosure authorized by notification implicates liberty interests protected under both the State and federal Constitutions. *Id.*, 662 A.2d at 419. As a matter of state law, respondent is bound by the *Doe* court's conclusions, as well as by the procedural requirements dictated by the court's holding. However, the *E.B.* court, relying on *Paul v. Davis*, rejected the notion that the publication of information of registrants' convictions and findings of dangerousness implicates any interest of fundamental constitutional magnitude. *E.B.*, *supra*, 119 F.3d at 1104, App. B at 61a.[3] Although the court of appeals did not embrace the *Doe* court's holding that community notification implicates a protected liberty interest under the United States Constitution, it predicated its divergent due process analysis solely on the state court's finding of liberty and privacy interests protected under the New Jersey Constitution. It was on this state law basis that the federal court was able to contradict the holding of New Jersey's highest court, ruling that federal due process mandates additional procedural protections beyond those ordered by the state court. *E.B.*, 119 F.3d at 1105, App. B. at 65a-66a.

The court of appeals, in holding that the procedural protections of the Fourteenth Amendment are automatically triggered by the state court's recognition of a liberty interest under the state Constitution, relied on two cases, *Gagnon v.*

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[3] The Ninth Circuit reached a similar conclusion in its application of *Paul v. Davis*, rejecting the notion that notification under the Washington state law implicates a constitutional right to privacy and a protected liberty interest under the Due Process Clause. *Russell v. Gregoire*, 124 F.3d 1079, 1093-94 (9th Cir. 1979).

Scarpelli, 411 U.S. 778 (1973), and *Morrissey v. Brewer*, 408 U.S. 471 (1972), which apply Fourteenth Amendment due process protections to statutorily-created rights. However, this Court has never extended this precedent, traditionally applied in the context of such parole and probation cases, to encompass liberty interests recognized under state constitutional procedural principles.

In making this leap, the court of appeals expanded the scope of "liberty interest" as used in the context of the federal Due Process Clause beyond the boundaries previously recognized by this Court. The court of appeals did not find the interest in avoiding public disclosure of information under Megan's Law to be protected under the Due Process Clause of the federal Constitution, nor did it identify a state statute which creates an interest in avoiding notification. The court of appeals' extension to protected state liberty interests of the case law principle previously applied to statutorily-created rights lacks precedential support.

Similarly, the "property interests" in the cases which the court below cites as a corollary regarding its perception of the expansive approach this Court has taken with respect to application of the Fourteenth Amendment to "virtually all rights that states will enforce in a court of law[,]" *E.B.*, 119 F.3d at 1106 n.27, App. B. at 67a-68a, involve interests of a different nature than those at issue here. As this Court has held, "[p]roperty interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law....'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985), *quoting Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Thus, without any support in a decision of this Court, the *E.B.* court held that a liberty interest which a federal court acknowledges as arising only in the context of state constitutional due process analysis is tantamount to a right

created by state law for purposes of application of the Fourteenth Amendment.

Under the reasoning applied in *E.B.*, an interest which is not protected under federal due process jurisprudence would nonetheless trigger such protection because it receives procedural protections mandated by the state Constitution. This construction of liberty interests under the Fourteenth Amendment provides for an overlay of federal judicial review which will subject state courts analyzing state-recognized liberty interests to routine second-guessing by federal courts on the extent of procedural protections required. This result is analogous to that rejected by the Court in *Paul v. Davis*, which would have made the Fourteenth Amendment "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.*, 424 U.S. at 701. Disapproval of this construction of liberty interests under the Fourteenth Amendment would reinforce the vitality of procedures established pursuant to state constitutional requirements as well as ensure the autonomy of state court review of state constitutional issues.

Finally, it is appropriate to address the issue of whether, in light of the September 10, 1997 order by the Supreme Court amending the Megan's Law hearing procedures to incorporate the burden of persuasion and standard of evidence required by *E.B.*, the issue has become moot. The burden of demonstrating mootness is a heavy one and, as a general rule, "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953), *cited in County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979).

The injunction directed by the order in *E.B.* prevented the execution of existing final orders authorizing

Tier 2 and Tier 3 notification which complied with all due process requirements as established by the state court, and effectively foreclosed the implementation of any future notification orders (119 F.3d at 1111, App. B at 81a). In response to the Attorney General's application to amend the Megan's Law judicial review procedures, the Supreme Court of New Jersey modified the procedures to enable the State to implement community notification in accordance with the injunction directed by *E.B.*[4] The order did not vacate or reverse the *Doe v. Poritz* decision, but merely affected a change in the existing procedure to enable the implementation of the law in light of the injunction. It would make little sense to instigate further delay in the implementation of an important public safety measure by seeking to restore the prior procedure, thereby precipitating additional federal litigation and a renewed injunction against notification, in order for the Court to resolve this decisional conflict. These exceptional circumstances justify a conclusion that this matter is not moot.

Accordingly, in order to resolve the direct conflict between the state and federal courts concerning the burden of persuasion and standard of proof required by the Due Process Clause of the federal Constitution in judicial proceedings under Megan's Law, and to more fully delineate the proper scope of "liberty interests" in the context of the Fourteenth Amendment, the Court should grant this cross-petition in the event it decides to review the court of appeals' decision in *E.B.*

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[4] The court of appeals issued a subsequent order, following Justice Souter's order denying petitioners' application to extend the stay of community notification pending consideration of their petition for writ of *certiorari*, which vacated all orders previously entered staying the implementation of community notification. It should be noted that the court of appeals had been provided with the September 10, 1997 order of the Supreme Court of New Jersey.

CONCLUSION

For the reasons stated above, the Attorney General of New Jersey respectfully requests that, in the event the Court grants the petition for a writ of *certiorari* filed by petitioners, the Court grant this conditional cross-petition for a writ of *certiorari* and set this case for plenary review.

Respectfully submitted,

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Dated: December 28, 1997